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Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-5638

BRUCE EDWARD MURRAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPORTING PETITION ON BEHALF OF APPELLANT BY AMICUS CURIAE

The American Friends Service Committee of Minnesota, Minneapolis Friends Meeting and the Peace and Social Action Committee of the Twin Cities Friends Meeting

JOHN REMINGTON GRAHAM
212 West Franklin Avenue
Minneapolis, Minnesota 55404
Attorney for Petitioner

ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D.C. 20530
Attorney for Respondent

CHESTER A. BRUVOLD
404 WCCO Radio Building
625 Second Avenue South
Minneapolis, Minnesota 55402
Phone: 338-5247
Attorney for Amicus Curiae

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INTEREST OF AMICUS

The American Friends Service Committee of Minnesota, Minneapolis Friends Meeting and the Peace and Social Action Committee of the Twin Cities Friends Meeting are all organizations established by Quakers in the Twin Cities area and all have the traditional Quaker concern for the individual with religious convictions who comes into conflict with the society in which he lives. While the appellant in this case is not a member of the Society of Friends, he has acquaintance with some of the younger people who are members of the society. After careful consideration of the issues and the argu-

ments presented in the supporting petition on behalf of the appellant, the named groups are concerned that the Court recognize the right of conscience and have a great religious interest in urging this upon the Court as a necessity if we are going to preserve our religious and political freedom.

STATEMENT OF FACTS

For a complete statement of the facts, Amicus adopts the statement of the petitioner. Amicus' position is based upon a generalized finding of fact which can be summarized as follows: That petitioner was late under Selective Service Regulation in filing his S.S.S. Form 150 claiming conscientious objection to participation in war in all forms by reason of his religious beliefs; that the evidence established that he was sincere in those beliefs; that the Selective Service System refused to consider his claim upon the merits; and that under no circumstance could petitioner ever accept induction into any military service because to accept such induction would violate his fundamental beliefs.

The issue to which Amicus specifically address this supporting brief is the question of the "right of conscience" as a Ninth Amendment right.

The Constitutional Provision involved is:

> "ARTICLE IX
>
> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

ARGUMENT

By way of a clarifying statement, it is Amicus' position that First Amendment rights insofar as they concern the Selective Service Law have been stated in *U. S. v. Seeger*, 380 U.S. 163, and in *U. S. v. Welch*, 398 U.S. 333. The Court has clarified this issue correctly. The government cannot define a religious conviction and grant or deny a certain status upon the basis of preferring one set of religious principles over another. Whatever the basis of the registrant's religious beliefs, if they are sincerely held, such beliefs must be recognized. Thus it is Amicus' position that to decide First Amendment rights under the Selective Service Law one can turn to the *Seeger* case and cases decided thereunder, so this issue will not be argued in this brief.

In contradiction, it is Amicus' position that constitutional questions have been raised by the Court's decision in *Ehlert v. U. S.*, 402 U.S. 99, in exactly the manner which the Court sought to avoid in the *Seeger* decision. The Court should note that *no constitutional issues* were raised by counsel in the *Ehlert* case (see Appellant's Brief, File No. 120, Oct. Term, 1970). Appellant's brief there argued only statutory construction without reference to any constitutional issue other than a mention of due process. While there may be some distinction between the *Ehlert* case and this case in that in this case the petitioner's convictions are such that he clearly could not accept induction, yet the distinction is not great. The real question is, *can religious convictions be overridden by governmental regulations so as to compel a person to do an act which violates those convictions?* Amicus says no. There is a Ninth Amendment right of conscience which cannot be so denied without disparaging rights reserved to the people.

Is refusal to participate in war, i.e., participate in a military organization, under certain circumstances a constitutional right? The petitioner in his argument established that this right was recognized historically by the framers of the Constitution and by the First Congress in writing the Bill of Rights. Amicus is not going to repeat those arguments. They are well stated and authentically documented.

When one turns to the Ninth Amendment, one must either treat it as mere verbiage without meaning or else give it substance:

> "ARTICLE IX
>
> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

To deal with these words, one must come to a definition of "what is a right"? One of relative recent recognition is the right of privacy (*Alderman v. U. S.*, 394 U.S. 165, and other cases dealing with eavesdropping). No one seriously questions that every person has a right of privacy, yet this is nowhere stated in the Constitution or any Amendment. What is there about such a concept that causes this almost universal human response? Do "rights" exist because a government grants them, or do "rights" exist because they have in them some inherent concept, some inherent human response, about which a human being has a sense and feeling that this is necessary for his own personal life and interference somehow invades his own personal being. It is Amicus' position that this is the substance of such concepts which are involved in the Ninth Amendment.

Just what is there about human beings and human conduct which is designated by the word "rights"? We speak of "human rights", "civil rights", "constitutional rights", "individual rights", "societal rights", and rights in a varie-

ty and multiplicity of ways. Are these essential aspects of the same concepts? We speak of "freedom of speech" as a right; we speak of "freedom of religion" as a right; we speak of "jury trial" as a right; we speak of having the advice and assistance of counsel as a right; we speak of voting as a right; we speak of education as a right; we speak of the pursuit of happiness as a right; we speak of liberty as embodying all such rights and many more. Just what is the human conduct, or behavior, which causes these concepts, these forms of conduct, these living conditions, to be designated as rights? By coming to understand what there is about these concepts we learn what makes them so important. One readily observes that there is something indivjdual about them. They pertain to an individual human being. One can readily observe that there is a societal concept about them. The hermit residing all by himself has no need of such concepts, but man living with his neighbor does. Thus they must relate to both the individual and to the society in which he lives. These then are concepts that arise because man has come to live gregariously, has come to live collectively. What they define then is the relationship between the individual and the society in which he lives. What is the purpose of such definition, or the necessity of such definition? The answer is clear, each man, each human being, is an entity. It is only in the mind, the awareness of the individual, that knowledge exists. While every person is a product of his heredity and his environment, including the mores, habits and knowledge of the society in which he lives, it is the individual who perceives this and it is the individual who communicates this on to other indivduals. The collective man is but a concept of the indiyidual man.

It is to define the relationship of the individual man to the society in which he lives then that the concepts of

"rights" have been developed. "Life, liberty and the pursuit of happiness" are defined in the Declaration of Independence as absolute and inalienable rights. Just what is there about "life", "liberty" and the "pursuit of happiness" which causes us to classify as fact that these concepts are absolute and inalienable? No one questions that every person has a "right to live", i.e., a right to life itself. To deny this is to deny individual existence; to deny this is to make the individual but a "cell" in an organic societal structure. It can be argued and must be recognized that if an individual man commences taking the lives of other individuals and no other way can be found to prevent him continuing to kill, then it may become necessary to take the life of such an individual. But this does not destroy the basic principle that the right to life is absolute and inalienable, as we shall see on further analysis.

As to the concept of "liberty" being an absolute and inalienable right, we must first have an understanding of "liberty". Liberty certainly is not license, i.e., liberty certainly is not a concept which grants to a person a power over others, or to injure or exploit others. In order to understand liberty one must first understand that this is a concept of thought and relationship. This is much misunderstood because liberty does not primarily pertain to conduct, but rather to a state of mind. A man has no liberty if he thinks of himself as a slave, as a person whose thought, whose mind, is controlled by some other person. Liberty is the process of making a decision, and particularly the decision as to the individual's relations to other members of society. Of course, the individual decisions are useless if he cannot act upon them, thus we many times confuse the acts of the individual with the concept of liberty. We do judge and evaluate each other on the basis of behavior, con-

duct, and acts, and not on the thinking processes of each other. It is because the individual's outward behavior reflects his thoughts that we all too easily overlook a basic factor—that liberty is a state of mind and not behavior. But we must also recognize that, by controlling the behavior of the individual, the individual's state of mind can be controlled. But just as the concept of life can be said to be absolute and inalienable, so also can we say that liberty is absolute and inalienable. It is a fact which belongs to the individual as absolutely as life itself. Yet here again we must recognize that outward manifestations of liberty, i.e., behavior on the part of one individual that operates to destroy the liberty of other individuals can compel limitations on this concept if it is thought to mean unrestrained activity. But again such limitations do not in the final analysis constitute a denial of liberty as an absolute and inalienable right.

In the same manner if we analyze the concept of "pursuit of happiness" we are confronted with the distinction with the concept of "license". Does this mean that one individual can pursue his own aspirations by the infliction of injury and suffering upon others? The question is directly involved in the individual's conduct in the society in which he lives. When we speak of the "pursuit of happiness" as an absolute and inalienable right are we merely expressing an absurdity? Too many people fail to understand what is meant by the "pursuit of happiness" and thus they conclude the absurdity. The pursuit of happiness does not and cannot involve conduct or behavior by one person that inflicts anguish and injury to another, or denies to the other that person's pursuit of his own happiness. In order to understand this term as it was used in the Declaration of Independence one must have some understanding of the term as

defined by Locke, John Stuart Mills, Thomas Moore and other political philosophers. The right to individual pursuit of happiness to those political philosophers, to whom the phrase and concept owes its existence, can be briefly, even though thus not completely, summarized:

The pursuit of happiness is not a power or a license to plunder. It is a societal concept developed to negate the power to plunder. To plunder and destroy does not give to a socially conscious person any real happiness. Man, being basically a religious and gregarious creature, has always had to take into account other men, or man in general. A man living in a community has to take into account his neighbors, his family, his friends, those with whom he has economic and contractual relationships. A hermit alone in a wilderness may find a certain solitary contentment, but he does not secure that which is meant by the phrase "pursuit of happiness". This is a societal concept. The individual secures the satisfaction of his basic needs, mental as well as physical, by being a part of a society, a gregarious group. It is from having a concern and acting on that concern for the society in which he lives that the individual can be said to have his own pursuit of happiness. If the individual is physically and mentally healthy, he will seek to do those things that make life better for other persons. Thus man derives satisfaction from providing for his family, helping his friends, participating economically, socially, communicatively and with a concern for his own conduct and how it affects others. The concept thus involves the individual's responsibility for the people with whom he lives. The individual who thus functions on the basis of this individual responsibility is engaged in his own pursuit of happiness. Since each individual in a societal group must of necessity be given this responsibility, we speak of this as a "right".

Thus it can be said that responsibility and freedom are the same thing. To pursue this further one must turn to the political philosophers and the religions of the world. Such is not the purpose of this brief, but one must allude to this in order to understand the concept of what is a "right".

We can thus see that involved in this question of "rights" is a question of responsibility. The question of responsibility is a question of the individual concern for his fellow man. By way of an illustration in which this can be clearly recognized, if a physically strong man, by reason of his superior strength, takes the property of a physically weaker man, he is not acting responsibly toward the physically weaker man. There is a societal concept involved. Thus we say that the physically weaker man has a right to not having his property taken. As a societal concept, if the physically stronger man and the physically weaker man are to live together in a gregarious society with any concept of fairness and stability, then each must recognize a responsibility to the other. This is the concept of the pursuit of happiness.

This same concept of responsibility is also the essence of liberty. Liberty, or freedom, in a societal concept, and in a legal concept, can only be equated with responsibility. To be responsible is to have a concern. Thus those concepts of individual decision and individual action which a human being must have if he is to be responsible and have a concern must be defined as "rights".

Throughout any discussion on any concept of "rights" lies an underlying minor premise of restraint. A person, or a government, must *not* take affirmative action against another individual which encroaches upon that individual in some manner. It can be stated that a person acting out of a sense of responsibility must not take an action which injures another. A person has the right to religious freedom,

but he cannot act to the detriment and danger of another person. One cannot say that his religion requires human sacrifice and thus justify the taking of another's life. But what is meant by religious freedom is that the state or any other person cannot by force or threat compel another to accept a concept of religion with which he does not agree. This is the concept behind the school flag salute cases. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L.Ed. 1171, 63 S.Ct. 1178, 147 A.L.R. 674.

The Court states:

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the state to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and the right of the individual. The State asserts power to condition access to public education or making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stands on a right of self-determination in matters that touch individual opinion and personal attitude."

The students had a right not to participate. Many rights are expressed in terms of a right not to do certain acts. There is a restraint on compulsion. The individual has a right to refrain from certain acts and there is a restraint on those who would compel him to engage in those acts.

Certainly the most basic right of all is the right to live. If one asserts this as a right for himself, he must also assert this as a right for other men; he must grant to other men the right to live. Thus it becomes axiomatic that there is an obligation and right not to take another's life. From this

analysis it becames necessary to conclude that a person acting on the basis of his religious beliefs must have a right as a human being to say that he cannot take the life of another human being, that he cannot be compelled to decide that his life, or some other person's life, is more valuable than the life of some third person. If such action is palpably wrong because of the individual's convictions, such is not cured by saying that another person functioning as a government official has ordered him to engage in such acts. What we have is a concept that if by reason of a person's religious beliefs he cannot act as directed, he has a right to individually evaluate such conduct and having determined that it would violate his conscience, he cannot be compelled to take such affirmative acts. This can be described as the "right of conscience".

In order to deal with and understand the concept of rights as used in the Ninth Amendment, we must return to the distinction between "license" and "right", which has been previously discussed. A right is something inherent to the individual human being as we previously stated. A license is a grant of power. Both have become loosely defined as rights. Thus a state or a government grants a "fee" in land. This is a license to use the land, or to sell it, or the right to pass this license on to one's heirs. This license having been granted by the government is said to be "rights in land". But when a government takes power of a land area from a different government, it grants rights to this land to certain persons, and those who claim rights in this land from the prior government are no longer considered to have those rights. In this respect, and in many others, such rights in land differ from basic human rights. Similarly a government will grant a franchise to carry on economic enterprise to certain persons. We speak of such persons as having a

right to conduct such business, but again this differs from the concept of basic human rights. Similarly, the government grants a license to kill other persons taking unto itself the prerogative of determining who is to live and who is to die, but such a license certainly does not grant to the recipients the *right* to take another's life. It grants only a power to do so. This is obviously the reason that a soldier killing another human being in battle cannot be charged with murder. A government has given him the power to so act and, of course, it is the government which would have to charge him. It cannot be said that he had a right to engage in those acts, only that a government had given him the power to do so. If we fail to make this distinction, then the concept of "rights" as used in the Ninth Amendment becomes a bewildering array of words.

This concept of license as a grant of power can perhaps be explained by the history of human societal development. Historically as man became an ever more gregarious creature, it became necessary to give some legitimation to certain persons to maintain, for the common good, restraints and limitations upon those who violated the basic rights of others. Since those others with whom such problems arose were from his own group, or his own tribe, or his own community, there came to be accepted that certain persons within that society were better able to keep secure that group, that tribe, that community, and preserve the well being of the individual members. In time people came to accept such persons as chiefs, as lords, as kings. But once having attained this power to license, such persons have generally, throughout history, abused this power to license so that the government becomes the primary instrument in the denial of basic human rights. This comes to the historical argument concerning the imposition of military service by Eng-

land upon the colonies which has been dealt with in the petitioner's brief and will not be repeated here.

To fail to recognize the "right of conscience" as argued for by the appellant in his Petition is to sustain the use of the power to license in such a manner as to be a denial of a basic right; it is an abuse of that power. We are not dealing with the power to license itself, i.e., the power to have a military organization. What we are dealing with is the imposition of such license upon a person whose religious beliefs make it wrong for him to accept such a license. Would anyone seriously argue that the government is justified in requiring a person to whom the use and consumption of alcoholic beverages is unconscionable to have a license to sell alcoholic beverages? To argue that these are not comparable is to fail to understand the distinction between a license and a right.

It is certain to be argued that a government has an overriding right to maintain itself and that therefore no right of conscious can be recognized. This argument fails to understand a basic concept of constitutional government. Just as in dealing with other positions, one must look back into its source in history, so we must do here. Over the centuries man in a gregarious community came to accept the domination of those with military power as a means of better securing his own well being. But as the military leaders became more powerful, the idea developed that certain persons were of more value than others, that the lives of certain persons were more valuable than the lives of others. Couple this with the idea of hereditary kings and we soon have the concept being accepted that the king's life was more valuable than the whole kingdom, and so every individual came to understand that he must sacrifice his life to save his king. Since the king and the kingdom became one, the concept

soon developed that it was the duty, the obligation, to give up all rights that a person had to the king and the kingdom, even life itself. The reasoning, of course, was that the life of the king was worth all the combined lives of his subjects. But was it not in opposition to this concept of feudal aristocracy that constitutional governments came into being? But in the concepts of feudal aristocracy, the king's position was that he had all the power; he could grant a license or withhold it; he could restrict all freedoms; and his subjects' lives were to do with as he pleased. But in England such power came to be resisted by the people. Out of that resistance came certain limitations upon the power of the king. The basis of that resistance was the concept that people had "rights" which the king could not take from them. In the course of that conflict certain powers were left to remain with the king, but certain "rights" belonged to the people and with these the king could not interfere. The king could authorize, empower or license certain persons to engage in certain acts, but such persons, in doing those acts, could not infringe upon the rights of the people. It is for this reason that to this day law students study English constitutional history. That history is a struggle of the kings to expand the power to license and limit the rights of the people and of the people, in the form of Parliament, in the courts or in the streets, to limit the power of the king to license and empower officials to run the lives of people and to expand the concepts of rights held by the individual people in that society. By the Eighteenth Century this distinction was well established, but its boundaries have never been completely defined and may never be so. However, underlying the American Revolution is the concept that no person could ever exercise such authority as to obliterate the distinction between the power of government and the

rights of the people. From this determination came the concept of constitutional government. The government may have a right to maintain itself, but that right and that power is limited by the rights of its citizens. By way of an example, the government cannot say that because legal counsel argues on behalf of clients against the power of the government, that, therefore, persons who disagree with the government are not entitled to legal counsel. Long ago legal counsel in the old common law courts of England argued that the power of the king is limited and indeed the right of the king himself to rule was questioned, yet the right of unruly subjects to be represented by legal counsel had been recognized in the common law courts long before the concept of constitutional government came into being. This concept was clearly enumerated in the Sixth Amendment "and to have the assistance of counsel for his defense". Even a person who acts in open violent rebellion against the government is entitled to the assistance of counsel. Yet what greater threat to the existence of any government is there than open violent rebellion? Thus to argue that there is an overriding governmental right and power to protect itself and thus deny the "right of conscience" is to fail to understand the distinction between a license, or power, and a basic human right. It is indeed a failure to understand constitutional government.

Having established that there is and must be a basic "right of conscience", is this not clearly a basic right covered by the Ninth Amendment, which cannot be denied or disparaged? The petitioner has clearly established that the framers of the Constitution and those who drafted the Bill of Rights considered this to be so. Amicus calls to the Court's attention that at one time the First Congress considered certain specific additional wording to the Second

Amendment: "but, no person religiously scrupulous of bearing arms shall be compelled to bear arms". (See *Annals of Congress,* Vol. 1, Col. 434, and Patterson, *The Forgotten Ninth Amendment,* Bobbs-Merrill, Indianapolis, p. 111.) While this was deleted from this Amendment, it is readily apparent that the Second Amendment deals with the militia and not with religion or the rights of conscience. Clearly there was no attempt on the part of the First Congress in formulating the Bill of Rights to make a complete modification of all rights. The Ninth and Tenth Amendments make it clear that only certain ones were enumerated and that many others existed.

The case which comes closest to the issue discussed here is *U. S. v. Sisson,* 294 F. Supp. 511, 399 U.S. 267 (affirmed on other grounds), a decision of Judge Wyzanski of the Massachusetts District Court. Judge Wyzanski in his decision concluded that section 6(j) of the Selective Service Act (50 App. U.S.C. section 456 (j)) was unconstitutional because it deprived the defendant of his right to assert a claim to being a conscientious objector concerning which the Court concluded the defendant met all the requirements even though his beliefs were more of a social and moral code than unconditionally religious. The Supreme Court affirmed the decision on other grounds without dealing with this issue. While the decision may in certain aspects go further than was necessary in declaring the entire section unconstitutional, yet it is important to note that a very eminent and competent jurist had a basic reaction to the situation. It is this type of basic human reaction which is one of the indicia of a right "reserved to the people". There is human necessity based upon responsible conduct and responsible decision making which causes a person to conclude he cannot affirmatively act in the manner prescribed. It is not in the same

position as the commission of an overt act, it is rather a conclusion that, if a person is to act in that manner, such act would be palpably wrong for him; it would violate his conscience.

If we fail to come to grips and to recognize that in our present turbulent times the Courts must sustain the principles of individual rights and individual freedoms, then such rights and freedoms will be lost. Amicus urges upon the Court that the "right of conscience" is one of those rights and that it grants the appellant's Petition for Certiorari.

This case involves a basic concept of constitutional government which this Court needs to consider. Amicus is confident that upon consideration the Court will recognize the validity of appellant's position, reverse his conviction, and in doing so protect and clarify yet another of the great rights of constitutional government.

Respectfully submitted,

CHESTER A. BRUVOLD
404 WCCO Radio Building
625 Second Avenue South
Minneapolis, Minnesota 55402
Phone: 338-5247
Attorney for Amicus Curiae